SRC International Sdn Bhd & Anor v Dato' Sri Mohd Najib bin Hj Abd Razak

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCVC-340–05 OF 2021
MOHD ARIEF JC
24 MARCH 2021

Civil Procedure — Injunction — Mareva injunction — Application for Mareva injunction to prevent disposing of defendant's assets in Malaysia — Whether plaintiffs had good arguable case — Whether defendant had assets within Malaysian court's jurisdiction — Whether there was real risk that defendant's assets would be removed before judgment could be satisfied

The first plaintiff, SRC International Sdn Bhd ('SRC') was a wholly owned subsidiary of the Ministry of Finance (Incorporated) and the former was incorporated by the 1Malaysia Development Bhd ('1MDB'). The second plaintiff, Gandingan Mentari Sdn Bhd ('GMSB') was a wholly owned company of SRC whereas the defendant was the then Prime Minister of Malaysia and the Minister of Finance. The plaintiffs had applied for Mareva injunction seeking an order to prevent the defendant from removing from Malaysia or from disposing of or diminish the value of any of his assets in Malaysia up to the value of RM42m ('the said sum') pending the final determination or outcome of the action commenced against the defendant. In the main action, the plaintiffs contended that the said sum was fraudulently paid to the accounts of the defendant from SRC and GMSB through a company known as Ihsan Perdana Sdn Bhd ('IPSB'). The plaintiffs further argued that the defendant was guilty of the following: (a) breach of fiduciary duties owed to the plaintiffs; (b) acted fraudulently in misappropriating monies; (c) dishonestly participated or assisted in the breach of duties by the former directors of the plaintiffs (the tort of knowing receipt); and (d) dishonestly participated or assisted in breach of duties of IPSB (the tort of knowing receipt). The defendant had yet to file his defence, instead, the defendant had filed an application to stay proceedings ('encl 8') pending the outcome of the criminal appeal. In opposing the plaintiffs' application for Mareva injunction, the defendant submitted that: (i) the plaintiffs had no arguable case against the defendant; (ii) there was no real risk of dissipation of assets by the defendant and the arguments raised by the plaintiffs were mere illusory and unsustainable in fact and in law; (iii) the plaintiffs' application was late, grave and the delay was unexplained by the litigant; (iv) the balance of convenience did not lie in favour of the plaintiffs; (v) damages were adequate; and (vi) there must be undertaking as to damages by the plaintiffs.

Held, granting the orders sought by the plaintiffs against the defendant as contained in Annexure A annexed to the grounds of judgment:

(1) The applicable test to justify the grant of Mareva injunction were as followed: (a) the plaintiff must show that it had good arguable case; (b) the defendant must have assets within the Malaysian court's jurisdiction; and (c) there was a real risk that the assets would be removed before judgment could be satisfied (see para 21).

(2) The plaintiffs had shown sufficient evidence to indicate the existence of a good arguable case for their claims against the defendant for: (a) breach of the defendant's fiduciary duty to the plaintiffs, in particular against the SRC; (b) fraud — receipts of the funds wrongly and with the knowledge that these funds were from SRC and GMSB and were wrongly transferred to him without justification; (c) tort of misfeasance and abuse of power; and (d) dishonest assistance to the breach of the fiduciary duties owed by the directors and IPSB to the plaintiff — the tort of knowing receipt. Without detracting on the defendant's right to present his defence, the court found that the essential elements to constitute the plaintiffs' claims were fulfilled based on the evidence presented (see paras 38–39).

(3) The defendant's contention that he should not file his defence pending the outcome of the criminal appeal did not mean that the plaintiffs had failed to show a good arguable case. The defendant was entitled to his rights under the law and was entitled to have encl 8 heard before any direction to file his defence given by the court. There was no legal basis that the defendant's choice not to file his defence meant that the plaintiffs had failed to prove a good arguable case (see para 51).

(4) The defendant himself indicated in his affidavit in reply that he had assets within the jurisdiction. Further, the issue of the existence of the defendant's assets within the court's jurisdiction was also not raised as one of the grounds to oppose the application for Mareva injunction. Therefore, based on the evidence, the plaintiffs had shown that the defendant had assets within the jurisdiction of this court (see paras 53–54).

(5) The court was aware that it should not make any findings of liability at this stage. Neither should the court consider the outcome of the criminal proceedings against the defendant. However, for the purposes of determining whether there was any real likelihood that the assets would or may be dissipated to prevent the satisfaction of the judgment, the court found that the documents presented in evidence, the serious allegations levelled against the defendant and the failure of the defendant to rebut these allegations and provide reasonable explanation indicated sufficient reasons to believe that there was a real risk of dissipation of

A assets. This finding was made after the court considered 'the particular allegations of dishonesty' against the defendant, the lack of probity by the defendant and the evidence presented in the affidavits filed by the parties (see paras 67–68 & 70).

B **[Bahasa Malaysia summary**

Plaintif pertama, SRC International Sdn Bhd ('SRC') merupakan anak syarikat milik penuh Kementerian Kewangan (Diperbadankan) dan SRC telah diperbadankan oleh 1Malaysia Development Bhd ('1MDB'). Plaintif kedua, Gandingan Mentari Sdn Bhd ('GMSB') ialah syarikat milik penuh SRC manakala defendan adalah Perdana Menteri Malaysia dan Menteri Kewangan ketika itu. Plaintif-plaintif telah memohon injunksi Mareva bagi mendapatkan perintah untuk menghalang defendan daripada mengeluarkan dari Malaysia atau daripada melupuskan atau mengurangkan nilai mana-mana asetnya di Malaysia sehingga nilai RM42 juta ('jumlah tersebut') sementara menunggu penentuan muktamad atau keputusan daripada tindakan yang dimulakan terhadap defendan. Dalam tindakan utama, plaintif-plaintif berhujah bahawa jumlah tersebut telah dibayar secara curang kepada akaun defendan daripada SRC dan GMSB melalui sebuah syarikat dikenali sebagai Ihsan Perdana Sdn Bhd ('IPSB'). Plaintif-plaintif seterusnya berhujah bahawa defendan bersalah atas perkara-perkara berikut: (a) pelanggaran kewajipan fidusiari terhadap plaintif-plaintif; (b) bertindak secara curang dalam penyelewengan wang; (c) secara tidak jujur mengambil bahagian atau membantu dalam pelanggaran tugas oleh bekas pengarah plaintif-plaintif (tort 'knowing receipt'); dan (d) secara tidak jujur mengambil bahagian atau membantu dalam pelanggaran tugas IPSB (tort 'knowing receipt'). Defendan masih belum memfailkan pembelaannya, sebaliknya, defendan telah memfailkan permohonan untuk menangguhkan prosiding ('lampiran 8') sementara menunggu keputusan rayuan jenayah. Dalam menentang permohonan plaintif-plaintif untuk injunksi Mareva, defendan berhujah bahawa: (i) plaintif-plaintif tidak mempunyai kes yang boleh dipertikaikan terhadap defendan; (ii) tiada risiko sebenar kehilangan aset oleh defendan dan hujah-hujah yang dibangkitkan oleh plaintif-plaintif hanyalah ilusi dan tidak mampan dalam fakta dan undang-undang; (iii) permohonan plaintif-plaintif adalah lewat, serius dan kelewatan tersebut tidak dijelaskan oleh litigan; (iv) imbangan kemudahan tidak memihak kepada plaintif-plaintif; (v) ganti rugi adalah mencukupi; dan (vi) perlu ada aku janji tentang ganti rugi oleh plaintif-plaintif.

Diputuskan, membenarkan perintah-perintah yang dimohon oleh plaintif-plaintiff terhadap defendan seperti yang terdapat dalam 'Annexure A' alasan penghakiman:

(1) Ujian yang terpakai untuk mewajarkan pemberian injunksi Mareva adalah seperti berikut: (a) plaintif mesti menunjukkan bahawa ia mempunyai kes yang boleh dipertikaikan; (b) defendan mesti

mempunyai aset dalam bidang kuasa mahkamah Malaysia; dan (c) terdapat risiko sebenar bahawa aset akan dikeluarkan sebelum penghakiman dapat dipenuhi (lihat perenggan 21).

(2) Plaintif-plaintif telah mengemukakan keterangan yang mencukupi untuk menunjukkan kewujudan kes yang boleh dipertikaikan bagi tuntutan mereka terhadap defendan bagi: (a) pelanggaran kewajipan fidusiari defendan kepada plaintif-plaintif, khususnya terhadap SRC; (b) penipuan — penerimaan dana secara salah dan dengan pengetahuan bahawa dana tersebut adalah daripada SRC dan GMSB dan telah dipindahkan secara salah kepadanya tanpa alasan; (c) tort 'misfeasance' dan salah guna kuasa; dan (d) bantuan secara tidak jujur terhadap pelanggaran kewajipan fidusiari oleh pengarah-pengarah dan IPSB terhadap plaintif-plaintif — tort 'knowing receipt'. Tanpa menjejaskan hak defendan untuk mengemukakan pembelaannya, mahkamah mendapati bahawa elemen-elemen penting untuk membuktikan tuntutan plaintif-plaintif telah dipenuhi berdasarkan keterangan yang dikemukakan (lihat perenggan 38–39).

(3) Pendapat defendan bahawa dia tidak sepatutnya memfailkan pembelaannya sementara menunggu keputusan rayuan jenayah tidak bermakna bahawa plaintif-plaintif telah gagal untuk menunjukkan kes yang boleh dipertikaikan. Defendan berhak mendapat haknya di bawah undang-undang dan berhak agar lampiran 8 didengar sebelum apa-apa arahan untuk memfailkan pembelaannya diberikan oleh mahkamah. Tiada asas undang-undang bahawa pilihan defendan untuk tidak memfailkan pembelaannya bermakna bahawa plaintif-plaintif telah gagal membuktikan kes yang boleh dipertikaikan (lihat perenggan 51).

(4) Defendan sendiri menyatakan dalam afidavit jawapannya bahawa dia mempunyai aset dalam bidang kuasa. Seterusnya, isu kewujudan aset defendan dalam bidang kuasa mahkamah juga tidak dibangkitkan sebagai salah satu alasan untuk menentang permohonan injunksi Mareva. Oleh itu, berdasarkan keterangan, plaintif-plaintif telah menunjukkan bahawa defendan mempunyai aset dalam bidang kuasa mahkamah ini (lihat perenggan 53–54).

(5) Mahkamah sedar bahawa ia tidak sepatutnya membuat apa-apa dapatan liabiliti pada peringkat ini. Mahkamah juga tidak harus mempertimbangkan keputusan prosiding jenayah terhadap defendan. Walau bagaimanapun, bagi tujuan menentukan sama ada terdapat apa-apa kemungkinan sebenar bahawa aset tersebut akan atau mungkin dilesapkan untuk menghalang pelaksanaan penghakiman, mahkamah mendapati bahawa dokumen yang dikemukakan sebagai keterangan, dakwaan serius yang dilemparkan terhadap defendan dan kegagalan defendan untuk menangkis dakwaan ini dan memberikan penjelasan yang munasabah menunjukkan alasan yang mencukupi untuk

mempercayai bahawa terdapat risiko sebenar kehilangan aset. Dapatan ini dibuat selepas mahkamah mempertimbangkan 'dakwaan khusus ketidakjujuran' terhadap defendan, ketidakjujuran oleh defendan dan keterangan yang dikemukakan dalam afidavit yang difailkan oleh pihak-pihak (lihat perenggan 67–68 & 70).]

Cases referred to

Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83; [1995] 2 CLJ 893, CA (refd)

Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor [2019] MLJU 1509; [2020] 2 CLJ 346, HC (refd)

Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor [1998] 4 MLJ 1; [1998] 4 CLJ 754, CA (refd)

Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) and others [2020] HKCA 537, CA (refd)

Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals [2015] 4 MLJ 34; [2015] 6 CLJ 425, CA (refd)

Derby & Co Ltd and others v Weldon and others [1990] Ch 48, CA (folld)

Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors and another case [2020] MLJU 2197; [2020] 1 LNS 1975, HC (refd)

Keruntum Sdn Bhd v The Director of Forest & Ors [2018] 4 CLJ 145; [2017] MLJU 2437, FC (refd)

Lakatamia Shipping Company Ltd v Morimoto [2019] EWCA Civ 2203, CA (refd)

Les Ambassadeurs Club Ltd v Yu [2021] EWCA Civ 1310, CA (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva [1980] 1 All ER 213, CA (refd)

Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 CLJ 131; [2004] 3 MLJ 301, CA (refd)

Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen [1984] 1 All ER 398, QBD (refd)

Ras al Khaimah Investment Authority and others v Bestfort Development LLP and others [2018] 1 WLR 1099, CA (refd)

Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming [1995] 2 AC 378, PC (refd)

S&F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62, FC (refd)

Sakellarios Mavros v AA Constructions Pty Ltd (In Liquidation) and Dionisia Agapitos & 4 ors [1195] NTSC 19, SC (folld)

Suruhanjaya Sekuriti v Datuk Ishak bin Ismail & Anor [2017] 3 MLJ 478, CA (refd)

The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals [2022] 1 MLJ 316, CA (refd)

Three Rivers District Council and others v Governor and Company of the Bank of

England (No 5) [2005] 4 All ER 948, HL (refd)

Legislation referred to

Evidence Act 1950 s 43

Nagaraja Mutthiah (with Syafina Vani, Clement Tay, Lisa Yong and Amin Musyrif) (Rosli Dahlan Saravanan Partnership) for the plaintiffs.
Muhammad Farhan Muhammad Shafee (with Thilagan Mehanathan) (Shafee & Co) for the defendant.

Mohd Arief JC:

INTRODUCTION

[1] This is the plaintiffs' application for a Marejava injunction against the defendant that can be seen in encl 105.

[2] The plaintiffs application seeks, among others, an order to prevent the defendant from removing from Malaysia or from disposing of or diminish the value of any of his assets in Malaysia up to the value of RM42m pending the final determination or outcome of the action commenced against the defendant.

[3] After hearing the parties, I granted the orders sought by the plaintiffs subject to various amendments regarding time to enable the defendant to comply with the terms of the orders.

SUMMARY OF THE PLAINTIFFS CLAIM

[4] The first plaintiff ('SRC') is a wholly-owned subsidiary of the Ministry of Finance (Incorporated) ('MOFI'). It was originally incorporated as a private limited company by 1Malaysia Development Bhd.

[5] The second plaintiff ('GMSB') is a wholly owned company of SRC.

[6] The defendant was the Prime Minister of Malaysia and was also the Minister of Finance.

[7] The plaintiffs contend that the defendant was at all material times the Chairman of the Board of Advisors of 1MDB and the Advisor Emeritus of SRC from 1 May 2012–4 March 2019.

[8] This case revolves the loans that were obtained by SRC from KWAP (i) to the sum of RM4 billion pursuant to two facility agreements dated 16 August

2011 and 27 March 2012. The said loans were guaranteed by the Government of Malaysia by the two letters of guarantee dated 26 August 2011 and 7 March 2012. The details of these loans are contained in the plaintiff's statement of claim and the affidavit in support affirmed by Nur Syafinaz bt Abdullah.

[9] It is the plaintiffs case that the said loans were obtained due to the power and influence of the defendant and at the behest of Nik Faisal Ariff Kamil ('Nik Faisal').

[10] The plaintiffs contend that the defendant was the ultimate person in charge of SRC and he had control over the board of the company.

[11] The plaintiffs contends that between December 2014–April 2015, SRC via its AmIslamic Bank Bhd Account No 2112022010650 ('SRC AmIslamic Account 650') or through GMSB, via its AmIslamic Bank Account No 8881003806948 ('GMSB AmIslamic Account') disbursed funds to the sum of RM123m to a company known as Ihsan Perdana Sdn Bhd ('IPSB').

[12] It was alleged that IPSB was appointed via letter dated 3 September 2014 as SRC's corporate social responsibility partner. This programme was intended to benefit Malaysians and that all disbursements of sums would be made to IPSB via a grant to the said company to the sum of RM250m.

[13] The plaintiffs go on to claim that between December 2014 and February 2015, a total sum of RM42m was transferred to the defendant's account bearing Nos 2112022011906 and 2112022011880 held with AmIslamic Bank.

[14] It was also alleged that between April 2015–July 2015, IPSB then transferred further the sum of RM44,010,252.50 to third parties purportedly for CSR purposes.

[15] The plaintiff contends that the payments of the sums from SRC or GMSB or from Jendela Pinggiran Sdn Bhd to IPSB were not approved by the Board of Directors and were made without the knowledge of their board of directors of the aforesaid companies.

[16] For the purpose of the Mareva injunction sought by the plaintiffs, the main crux of their claim lies on the sum of RM42m that was allegedly paid to the accounts of the defendants from SRC and GMSB through IPSB.

[17] The plaintiffs allege that the said transfer of monies was wrong and was made purportedly as part of a grand design to defraud the said companies.

They contend that the alleged fraud only came to light after the defendant had to resign from the position as Prime Minister of Malaysia and as the Minister of Finance due to the 2014 General Election results.

[18] The plaintiffs further contend that the defendant is guilty of the following:

(a) breach of fiduciary duties owed to the plaintiffs — para 71 of the statement of claim;

(b) acted fraudulently in misappropriating monies — paras 72–79 of the statement of claim;

(c) dishonestly participated or assisted in the breach of duties by the former directors of the plaintiffs — paras 81–89 of the statement of claim — the tort of knowing receipt; and

(d) dishonestly participated or assisted in the breach of duties of IPSB — paras 90–94 of the statement of claim — the tort of knowing receipt.

[19] It is to be noted that the defendant has yet to file his defence. He has since filed an application in encl 8 to stay the proceedings pending the outcome of the criminal appeal before the Court of Appeal. This application will be heard on 13 May 2022.

APPLICABLE PRINCIPLES OF LAW — MAREVA INJUNCTION

[20] I thank counsels for their detailed submissions pertaining to the applicable principles regarding an application for a Mareva injunction.

[21] I find that the principles of law that should be considered by a court of law when dealing with a Mareva injunction are trite. I summarised the applicable test to justify the grant of a Mareva injunction as follows:

(a) the plaintiff must show that it has a good arguable case;

(b) the defendant must have assets within the Malaysian court's jurisdiction; and

(c) there is a real risk that the assets will be removed before judgment could be satisfied.

[22] I distilled the above principles from the decision of the Court of Appeal in *The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals* [2022] 1 MLJ 316, where Lee Heng Cheong JCA held:

[23] For a *Mareva* application, there are three pre-requisites to satisfy before the

court may issue a *Mareva* injunction. They were set out by Mohamed Azmi SCJ (as he then was) in the majority decision of the Supreme Court case of *Aspatra Sdn Bhd & Ors v Bank Bumiputra (M) Bhd & Anor* [1988] 1 MLJ 97; [1987] 2 CLJ 377; [1987] CLJ Rep 50 and they are as follows:

(a) the applicant must show that it has a good arguable case;

(b) that the defendants have assets within jurisdiction; and

(c) that there is a risk of the assets being removed before judgment could be satisfied.'

[23] I also refer to the following authorities:

(a) *Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva* [1980] 1 All ER 213;

(b) *S&F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; and

(c) *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG; The Nidersachsen* [1984] 1 All ER 398.

[24] Learned counsels for the defendant contends that the plaintiffs do not fulfill the above test. They contend that:

(a) the plaintiffs have no arguable case against the defendant;

(b) there is no real dissipation of assets by the defendant and the arguments raised by the plaintiffs are mere illusory and unsustainable in fact and in law;

(c) the plaintiffs application is late, grave and the delay is unexplained by the litigant;

(d) balance of convenience does not lie in favor of the plaintiffs;

(e) damages are adequate; and

(f) there must be undertaking as to damages by the plaintiffs.

[25] I will explain in the following paragraphs why I find that this is a suitable case for the orders sought by the plaintiffs and why I find that the above-referred test, in para 22, is fulfilled based on the affidavits and pleadings filed in this court.

The plaintiffs have shown a good arguable case against the defendant

[26] The first issue that I must consider is whether the plaintiffs have shown to my satisfaction that they have a good arguable case against the defendant.

[27] The crux of the defendant's argument is that the plaintiffs are unable 'to say with conviction that they have a good arguable case without the benefit of the defendant's defence'. Learned counsel for the defendant, argues that as the defendant has not filed its defence as he has filed an application to stay the proceedings pending the outcome of the suit in encl 8, then this court cannot find that there is a good arguable case as the evidence of the defendant must be considered as well.

[28] The learned counsel for the defendant also contends that the decision by the defendant not to file his defence at this juncture should mean that this court cannot find a good arguable case. In other words, they contend that I should wait until the defence is filed before I make any determination as to whether there is a good arguable case. The defendant relies on the decision of the Court of Appeal in *Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754.

[29] With respect, I find that the said argument is misplaced. In the above-referred decision, the Court of Appeal stated that a court of first instance hearing an application for Mareva injunction is duty-bound to consider the evidence presented by the defendant when he or she opposes the said application. Haidar Mohd Noor JCA (as he then was) delivering the judgment of the Court of Appeal stated:

> Regretably, the learned judge failed to consider at all the evidence of the appellants.
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> The learned judge should have critically evaluated the following evidence.
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> The appellants also attacked on the lack of particulars in the statement of claim of the respondents and this was not considered by the learned judge. For instance, nowhere in the statement of claim is pleaded regarding the conversion of the said lands from agriculture to industry and finally to housing. It was left open. This is a material fact that should be pleaded by the respondents. In this respect, Abdoolcader FJ in *S & F International Ltd v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; [1985] CLJ 280 said at p 66:
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> > ... We would *en passant* observe that a Mareva application must necessarily in respect of the claim on which it is premised relate to the pleading of the plaintiff in the action instituted and even if it is sought to remedy the position by affidavit, it would make no difference as any defect or omission in a statement of claim cannot be made good by affidavit evidence: *Gold Ores Reductian Co v Parr* [1892] 2 QB 14 where Mathew, J said that: 'it is most important that a defendant should know from the writ what the exact claim against him is'; this case was followed and applied by this court in *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 at p 207).
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> There were of course allegations and counter-allegations by both parties that some documents were forged. This is a matter of evidence at the trial proper.

Suffice to say that, if the learned judge had given a close and proper scrutiny to the evidence before him, in balancing the case of the respondent and the appellants, it would show that the respondents did not show that they had a good arguable case.

In any event, as stated earlier, the learned judge failed to consider at all the evidence of the appellants as reflected in his judgment. Clearly therefore, the learned judge fell in error in considering the ground of good arguable case.

[30] I am of the view what the Court of Appeal intended is that the judge hearing the application must consider not only the evidence of the plaintiffs but also the evidence presented by the defendant in his affidavit in opposition. This court is duty bound to consider the arguments and evidence presented closely and with sufficient scrutiny, in its task in determining whether the plaintiffs have shown a good arguable case. In other words, the pleadings and the evidence presented in the affidavits filed must be analysed and considered by me to determine whether there is a good arguable case.

[31] I also find guidance as to what is meant by a good arguable case, from the above cases to mean 'one which is more than barely capable of serious argument but not necessarily one which has to be better than 50% chance of success' (*The Customs and Tax Administration of The Kingdom of Denmark v Saling Capital Ltd & Ors and other appeals*). This need not be 'so strong as to warrant summary judgment nor even a strong prima facie case' (*Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor*).

[32] I note that much has been written about Mareva injunction and the need to show the existence of a good arguable case. However, litigants have forgotten or missed the advice given by Parker LJ in *Derby & Co Ltd and others v Weldon and others* [1990] Ch 48, where His Lordship stated:

There are in essence only three issues; (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that there are assets within and, where an extraterritorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory. Such matters should be decided on comparatively brief evidence. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407–408, Lord Diplock, dealing in that case with an application for an interlocutory injunction, said:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v Duke of Buccleugh* (1865) 12 LT 628, 629.

> In my view the difference between an application for an ordinary injunction and a *Mareva* lies only in this, that in the former case the plaintiff need only establish that there is a serious question to be tried, whereas in the latter the test is said to be whether the plaintiff shows a good arguable case. This difference, which is incapable of definition, does not however affect the applicability of Lord Diplock's observations to *Mareva* cases.
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> In the present case this seems to have been forgotten. It was not until the eighteenth day of the hearing before the judge that the defendants accepted that there was a good arguable case which, unless the many conflicts on the affidavit evidence are resolved in the defendants' favour, there plainly is. Moreover, the defendants sought to go into and obtain the court's view on questions of law, which the argument before us and the judgment of the judge show clearly to be questions calling for detailed argument and mature consideration. This is quite wrong. More recently, in relation to an application under RSC, Ord 12, r 8 to set aside service of a writ outside the jurisdiction, Lord Templeman in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 465, said that such cases should be measured in hours not days, that appeals should be rare and that this court should be slow to interfere. These observations in my view also apply to cases such as the present.
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> It is to be hoped that in future the observations of Lord Diplock and Lord Templeman will be borne in mind in applications for a *Mareva* injunction, that they will take hours not days and that appeals will be rare. I do not mean by the foregoing to indicate that argument as to the principles applying to the grant of a *Mareva* injunction should not be fully argued. With a developing jurisdiction it is inevitable and desirable that they should be. *What, however, should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a Mareva is sought or relating to the elements of the Mareva jurisdiction such as that of dissipation or (2) detailed argument on difficult points of law on which the claim of either party may ultimately depend. If such attempts are made they can and should be discouraged by appropriate orders as to costs*.

[33] This view was also adopted by Kearney J in the Australian case of *Sakellarios Mavros v AA Constructions Pty Ltd (In Liquidation) and Dionisia Agapitos & 4 ors* [1195] NTSC 19.

[34] It is also worth reminding oneself that the burden of showing that there is in existence a good arguable case is not an onerous one. I refer to the decision of the English Court of Appeal in *Lakatamia Shipping Company Ltd v Morimoto* [2019] EWCA Civ 2203 where Lord Justice Haddon-Cave held:

> Test for 'good arguable case'
>
> 35. The test for 'good arguable case' in the context of freezing injunctions is not a particularly onerous one (*Gee on Commercial Injunctions* (6th edn, 2016) at [12-026]).

36. An applicant for a freezing order does not need to establish the existence of a risk of dissipation on the balance of probabilities. It is sufficient for the applicant to prove a danger of dissipation to the 'good arguable case' standard. As Mustill J observed in *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 at 652:

> Mr Howard argues that the plaintiff must show a likelihood that his claim will prove fruitless if an injunction is refused. If likelihood involves the idea of 'more likely than not,' I consider that the level is pitched too high. In most cases the plaintiff cannot produce affirmative proof to this effect. All he can show is that a danger exists, and this is all that it seems to me the reported cases require.

37. There has been much discussion of the meaning of the 'good arguable case' test since Mustill J's well-known observation in *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep 600 at 605, namely that a good arguable case is a case 'which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success'.

38. The 'good arguable case' test was the subject of a comprehensive review by the Court of Appeal recently in *Kaefer v AMS* [2019] 3 All ER 979 in the context of jurisdictional gateways. Green LJ (who gave the leading judgment, Davis and Asplin LJ concurring) conducted a magisterial analysis of the recent authorities, including *Brownlie v. Four Seasons Holdings* [2017] UKSC 80 and *Goldman Sachs International v. Novo Banco SA* [2018] UKSC 34. He observed at [59] that a test intended to be straightforward 'had become befuddled by 'glosses', glosses upon gloss, 'explications' and 'reformulations'. The central concept at the heart of the test was 'a plausible evidential basis' (see paragraphs [73]–[80]).

[35] Guided by the above cases, I find that the plaintiffs have shown that they have a good arguable case against the defendant. In the affidavit in support the plaintiffs have shown that:

(a) that SRC was set up with the express approval of the defendant based on the letter issued by Shahrol Azral dated 24 August 2010;

(b) SRC was originally a wholly owned subsidiary of 1MDB Bhd but was eventually transferred to MOF Inc;

(c) the defendant was the Advisor Emeritus of SRC;

(d) the articles of association ('AOA') of SRC, in particular articles 117 and 118 of the SRC's AOA, indicate that his advice shall be duly considered by the board of the company and that this advice must be given due consideration to and to implement the said advice;

(e) he also had powers to appoint and dismiss the directors of SRC pursuant to article 67 and article 116 of AOA;

(f) Nik Faisal Ariff Kamil was appointed Chief Investment Officer and subsequently as Chief Executive Officer of SRC and a director of the said company;

(g) Nik Faisal Ariff Kamil was also the authorised personnel in charge of the aforesaid AmBank accounts of the defendant — see exh IJI 31 and exh IJI 32;

(h) the defendant had agreed with the proposal made by Nik Faisal Ariff Kamil that SRC was to obtain loans from KWAP as seen in the letter dated 3 June 2011 and the annotations to the said letter;

(i) loans from KWAP to SRC were obtained to the sum of RM4 billion as seen in the facilities agreement dated 26 August 2011 and a further sum of RM2 billion as seen in the facilities agreement dated 27 March 2012. The said agreements were also executed by Nik Faisal Ariff Kamil. These facilities were guaranteed by the Government of Malaysia;

(j) the defendant had also agreed to the proposal by Nik Faisal Ariff Kamil that SRC will distribute 50% of its excess cash for corporate social responsibility plans as seen in the letter dated 9 January 2012 and the written note to the said letter;

(k) Nik Faisal Ariff and Dato Suboh, another director of SRC, appointed Ihsan Perdana Sdn Bhd as SRC's CSR partner as seen in the letter dated 3 September 2014 and resolution dated 24 November 2015. Another resolution was also executed by Nik Faisal Ariff, Dato Suboh and Dato Mohammed Anuar also confirming the appointment of Ihsan Perdana dated 24 November 2015; and

(l) the evidence of the money trail of the funds to the sum of RM42m was transferred from the accounts of SRC to IPSB or from GMSB to IPSB which eventually flowed into the accounts of the defendant. A summary of the money trail was produced by the plaintiffs in its written submission and for ease of convenience is reproduced herein below:

Appendix A

Money trail from SRC/GMSB to Ihsan Perdana (CSR Purposes)

1. Between December 2014 and April 2015, SRC, by itself or through GMSB, disbured funds totalling RM123 million into IPSB's Affin Bank Account purportedly for CSR purposes (para 40 of the plaintiff's affidavit in support — Enclosure 106):-

No	Date	Disbursed By	Amount (RM)	Reference
(a)	15.12.2014	SRC	20 million	Enclosure 108, page 582, 597
(b)	24.12.2014	GMSB	40 million	Enclosure 108, page 583
(c)	9.1.2015	GMSB	40 million	Enclosure 108, page 599
(d)	5.2.2015	GMSB	5 million	Enclosure 108, page 610

(e)	6.2.2015	GMSB	5 million	Enclosure 108, page 621
(f)	13.2.2015	GMSB	10 million	Enclosure 109, page 643
(g)	9.4.2015	GMSB	3 million	Enclosure 109, page 658
Total Amount Disbursed (RM)			123 million	

– Money train from Ihsan Perdana to Dato' Sri Najib — RM42 million

2. Between December 2014 and February 2015, a total sum of RM42 million was transferred to tow (2) AmIslamic Bank Accounts belonging to Dato' Sri Najib, i.e. Account number 2112022011906 ('Account 906') and Account number: 2112022011880 ('Account 880'), details of which are as follows:-

No	Date	Amount (RM)	Beneficiary	Reference
1.	26.12.2014	27 million	Account 880	Enclosure 109, pg 663, 659
2.	26.12.2014	5 million	Account 906	Enclosure 109, pg 662, 659
3.	10.2.2015	10 million	Account 880	Enclosure 109, pg 664

Evidence that Account 880 belongs to Dato' Seri Najib can be seen in Enclosure 109, page 679.

Evidence that Account 906 belongs to Dato' Seri Najib can be seen in Enclosure 109, page 675, 679.

[36] On the above claim, the defendant in his affidavit reply stated:

(a) he chose not to file his defence as he believes that may prejudice his right to defend the charges brought against him that are now subject to an appeal before the Federal Court;

(b) that this issue should only be determined once the defence is filed; and

(c) that there is no concrete evidence to support the facts pleaded.

[37] Having considered the evidence produced and the reply put forward by the defendant, I find that the plaintiffs have successfully shown that they have a good arguable case against the defendant.

[38] I find that the plaintiffs have shown sufficient evidence to indicate the existence of a good arguable case for their claims against the defendant for:

(a) breach of the defendant's fiduciary duty to the plaintiffs, in particular against SRC;

(b) fraud — receipts of the funds wrongly and with the knowledge that these funds were from SRC and GMSB and were wrongly transferred to him without justification;

(c) tort of misfeasance and abuse of power; and

(d) dishonest assistance to the breach of the fiduciary duties owed by the Directors and IPSB to the plaintiffs — the tort of knowing receipt.

[39] I am aware, as stated in the above referred cases, that I should not express 'any opinion upon the merits of the case' until its disposal at trial. However, without detracting on the defendant's right to present his defence to the plaintiffs' claim, I find that the essential elements to constitute the claims brought forward by the plaintiffs are fulfilled based on the evidence presented.

[40] I find that the plaintiffs have pleaded and proven the existence of a good arguable case for the tort of knowing receipt and fraud. For this purpose, I refer to the judgment of Lord Nicholls on behalf of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378:

> The airline seeks a remedy against the travel agent's principal director and shareholder. Its claim is based on the much-quoted dictum of Lord Selborne LC, sitting in the Court of Appeal in Chancery, in *Barnes v Addy* (1874) LR 9 Ch App 244, 251–252:
>
> > That responsibility [sc, the responsibility of a trustee] may no doubt be extended in equity to others who are not properly trustees, if they are found … actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But … strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.
>
> In the conventional shorthand, the first of these two circumstances in which third parties (non-trustees) may become liable to account in equity is 'knowing receipt', as distinct from the second where liability arises from 'knowing assistance'. Stated even more shortly, the first limb of Lord Selborne's formulation is concerned with the liability of a person as a recipient of trust property or its traceable proceeds. The second limb is concerned with what, for want of a better compendious description, Can be called the liability of an accessory to a trustee's breach of trust. Liability as an accessory is not dependent upon receipt of trust property. It arises even though no trust property has reached the hands of the accessory. It is a form of secondary liability in the sense that it only arises where there has been a breach of trust. In the present case the plaintiff relies on the accessory limb. The particular point in issue arises from the expression 'a dishonest and fraudulent design on the part of the trustees'.

[41] I also refer to the decision of Darryl Goon Siew Chyew J (as he then was) in *Jaya Sudhir a/l Jayaram v Dato' Seri Timor Shah Rafiq & Ors and another case* [2020] MLJU 2197; [2020] 1 LNS 1975, where he stated:

> [337] In respect of dishonest assistance, reliance was placed by learned counsel for NSSB on a summary of its elements in a decision of the Court of Appeal of Singapore in *Caltong (Australia) Pty Ltd (formerly known as Tong Tien See Holding (Australia) Pty Ltd) and another v Tiong Tien See Construction Pte Ltd (in liquidation) and another appeal* [2002] 3 SLR 241. In *Calthong (Australia) Pty Ltd v Tiong Tien See Construction Pte Ltd*, Chao Hick Tin JA stated as follows:
>
> > [33] The elements which must be proved to establish dishonest assistance are (see *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 2 AC 378; [1995] 3 All ER 97):
> >
> > (1) that there has been a disposal of his assets in breach of trust or fiduciary duty;
> >
> > (2) in which the defendant has assisted or which she/he has procured;
> >
> > (3) the defendant has acted dishonestly;
> >
> > (4) resulting loss to the claimant.
>
> However, with respect, there are now authorities to the effect that disposal of assets in breach of trust or fiduciary duty is not a necessary element in knowing assistance, unlike in knowing receipt
>
> [338] In *Kuan Pek Seng & Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174; [2012] 1 LNS 775, Jeffrey Tan FCJ, delivering the judgment of the Court of Appeal stated, quoting from *Barnes v Addy*:
>
> > 'Knowing assistance' is one of two types of third party liabilities under trust law, established in *Barnes v Addy* [1874] LR 9 Ch App 244, and based on the following dictum of Lord Selbourne LC:
> >
> > ...
> >
> > [56] As a general rule, *there must be a breach of trust or fiduciary duty by someone other than the defendant, the defendant must have helped that person in the breach, and the defendant must have a dishonest state of mind.* (Emphasis added)
>
> [339] The learned editors of the 19th Edition of *Underhill and Hayton, Law of Trusts and Trustees*, pp 1293–1294, state as follows:
>
> > Elements of liability as a dishonest assistant
> >
> > 98.47 To make a defendant personally liable for dishonest assistance in a breach of trust or other fiduciary duty it is necessary to establish:
> >
> > (1) a breach of trust or fiduciary duty;
> >
> > (2) assistance by the defendant in the breach;
> >
> > (3) a causal link between and a gain to the defendant, depending on the remedy which is sought; and

(4) a dishonest state of mind on the part of the assistant.

[42] I also find that the plaintiffs have pleaded and shown sufficient evidence the existence of a good arguable case for breach of fiduciary duties that are allegedly owed by the defendant. I again refer to the decision of Darryl Goon J in the above cited case that had also explained the legal requirements for a claim for breach of fiduciary duty:

> [341] In *Gurbachan Singh Bagawan Singh & Ors v Vellasamy Pennusamy & Other Appeals* [2015] 1 MLJ 773; [2015] 1 CLJ 719, Richard Malanjum CJ (Sabah and Sarawak), as His Lordship then was, stated that:
>
> > [54] *For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or to advance the interests of another.* This is perhaps the most obvious of the characteristics of the fiduciary office for equity will only oblige a person to act in what he believes to be another's interests if he himself has assumed a position which requires him to act for or on behalf of that other in some particular matter'. *Thus, the essential element is that there must be some undertaking on the part of the fiduciary to act with loyalty in the interest of the other party.* 'A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise toa relationship of trust and confidence'. (Emphasis added.)
>
> [342] In *Bristol and West Building Society v Mothew* [1998] Ch 1 at p 19, Millett LJ observed that:
>
> > *A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith* he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* [1977], p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary. (Emphasis added.)
>
> [343] In *Chirnside and Another v Fay* [2007] 2 LR 407 at pp 436–437, a decision of the Supreme Court of New Zealand, Tipping J (which whom Blanchard J concurred) in a majority judgment stated:
>
> > [73] Many cases, textbooks and articles in learned journals have considered when and against what criteria the courts will find that a relationship gives rise to fiduciary duties. *In essence, there are two situations in which that will be so. In the first, the relationship is of a kind which, by its very nature, is recognised as being inherently fiduciary.* Most cases involving a breach of fiduciary duty are of this kind. They fall into one of the recognised categories of relationships which are inherently fiduciary. These include the relationships of solicitor and client,

trustee and beneficiary, principal and agent, and doctor and patient. (Such relationships will almost always give rise to fiduciary duties on the part of the relevant party, albeit, as noted at para [72], above, a breach of duty by a fiduciary is not necessarily to be regarded as a breach of fiduciary duty (*Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664 at 680, 688, *Bristol v. West Building Society v Mothew* [1998] Ch 1 at 16 per Millett LJ and *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 WLR 567 at [29], approving Millett LJ's approach in Mothew).)

[74] *There is a strong case for saving that most joint venture relation ships can properly be regarded as being inherently fiduciary because of the analogy with partnership.* (See the discussion in Equity and Trusts, para 14.3.6, commencing p 418) The relationship between partners is one which has traditionally been regarded as a classic example of a fiduciary relationship in that the parties owe to each other duties of loyalty and good faith; and they must, in all matters relevant to the activities of the partnership, put the interests of the partnership ahead of their own personal interests. (See *Equity and Trusts* para 14.3.6, fn 444.)

[75] *The second situation in which a relationship will be classed as fiduciary depends not on the inherent nature of the relationship but upon an examination of whether its particular aspects justify it being so classified. No single formula or test has received universal acceptance in deciding whether a relationship outside the recognised categories is such that the parties owe each other obligations of a fiduciary kind* ...

...

[80] It is clear from the authorities that relationships which are inherently fiduciary ail possess the feature which justifies the imposition of fiduciary duties in a case which fails outside the traditional categories; *all fiduciary relationships, whether inherent or particular, are marked by the entitlement (rendered in Arklow as a legitimate expectation) of one party to place trust and confidence in the other. That party is entitled to rely on the other party not to act in a way which is contrary to the first party's interests.* (Emphasis added.)

[43] The evidence produced by the plaintiffs shows that the monies from SRC and GMSB were transferred through the accounts of IPSB and eventually went into the accounts of the defendant. The plaintiffs contend that these were made fraudulently and were in breach of the duties owed by the directors to the companies and wrongfully retained by the defendant without justification.

[44] The plaintiffs further contend that the defendant had known or should have known that these monies were wrongfully transferred to him especially in view of his position as Emeritus Advisor to SRC and the close proximate relationship he had with the plaintiffs and with Nik Faisal Ariff Kamil. Nik Faisal Ariff was also the same person who had control of his accounts.

[45] I shall refrain myself from making any determination on the merits of the claims, but in view of the silence by the defendant in his affidavit in reply

to these allegations and his decision not to file his defence to the claim at this juncture, I find that there is a good arguable case for the above alleged wrongs against the defendant.

[46] I further find that the plaintiffs have also pleaded and proven sufficient evidence to show the existence of a good arguable case for the tort of malfeasance in public office alleged against the defendant. I refer to the elements required that constitute the tort in question as seen in the leading authority of *Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948 and the decision of Azizul Azmi Adnan J in *Asia Pacific Higher Learning Sdn Bhd v Majlis Perubatan Malaysia & Anor* [2019] MLJU 1509; [2020] 2 CLJ 346. Azizul Azmi J summarised Lord Steyn judgment succinctly as follows:

> Lord Steyn described the ingredients of the tort of misfeasance in public office as comprising the following:
>
> (i) the defendant must be a public officer;
>
> (ii) there must have been an exercise of power as a public officer; and
>
> (iii) as regards the state of mind of the defendant, there must either have been:
>
> (a) targeted malice by the public officer, ie, conduct specifically intended to injure the plaintiff. The bad faith here involves the exercise of a public power for an improper or ulterior motive; or
>
> (b) knowledge by the public officer that he has no power to carry out the act complained of and that the act will injure the plaintiff. The bad faith arises in this case because the officer does not have an honest belief that his act is lawful;
>
> (iv) there must have been a duty owed by the defendant to the plaintiff. Here, the plaintiff must show sufficient legal interest to found a legal standing to sue. Proximity need not be established;
>
> (v) there must be causation between the acts complained of and the damage suffered by the plaintiff; and
>
> (vi) the plaintiffs must have suffered damage that are not too remote. The test for remoteness of damage was expressed in the following terms: the plaintiff must establish either that the defendant acted in the knowledge that his act would probably injure the plaintiff or a person in a class of which the plaintiff was a member, or that the defendant did not care whether his acts would have such a consequence. This is stricter than the test of reasonable foreseeability applicable in negligence cases.
>
> [101] It was once thought that the tort of misfeasance in public office was only actionable by individuals; however, the Court of Appeal case of *Bourgoin SA v Minister of Agriculture* [29] now makes it clear that the cause of action available to companies as well.

A [102] In the following paragraphs, I examine each element of the cause of action in the context of the facts of the present case.

[47] I also refer to the decision of the Federal Court in *Keruntum Sdn Bhd v The Director of Forest & Ors* [2018] 4 CLJ 145; [2017] MLJU 2437 and of the
B Court of Appeal in *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 CLJ 131; [2004] 3 MLJ 301 where the above principles laid down in the above cited English case were cited with approval.
C

[48] In view of the above, I also find that the pleadings and the evidence presented in the affidavits filed by parties indicate the existence of a good arguable case against the defendant the tort of misfeasance in public office.

D

[49] The defendant was the Prime Minister and Minister of Finance at the material time. The plaintiffs, in particular SRC, was a company wholly owned by MOF Inc. He also held the position as Emeritus Advisor to SRC and that Nik Faisal Ariff Kamil was the CEO and also the authorised personnel in
E charge of the defendant's accounts. Monies were allegedly transferred from the plaintiffs accounts into the defendant's account without any valid reason. No explanation why the said sums were paid to the defendant and what happened to these funds was disclosed by the defendant in his affidavit in reply.

F

[50] I must make it clear that the above does not mean that the defendant is liable for the claims alleged against him. This must be determined at trial, but the pleadings and evidence presented are sufficient to indicate a good arguable case against him. More so, when the defendant chose not to give any
G explanation as to why the said funds were transferred into his account.

[51] On a final note, on this issue, I also find that the defendant's contention that he should not file his defence pending the outcome of the criminal appeal does not mean that the plaintiffs have failed to show a good arguable case. The
H defendant is entitled to his rights under the law and is entitled to have encl 8 heard before any direction to file his defence is given by me. I do not find any legal basis that the defendant's choice not to file his defence means that the plaintiffs have failed to prove a good arguable case.

I **[52]** Based on the pleadings as they appear before me today, the evidence as well as arguments stated in the affidavits and submissions filed, I find that the plaintiffs have shown a good arguable case. Using the words of Haddon-Cave LJ, I opine that there is sufficient plausible evidential basis to support the plaintiffs' claim against the defendant.

The defendant has assets within the Malaysian court's jurisdiction

[53] I find that this issue is not in dispute. The defendant himself indicates in his affidavit in reply that he has assets within the jurisdiction. An example is the return of the sums of RM114,164,393.44 pursuant to the order of the court in the Criminal Application No WA-44–77–05 of 2019. The issue of the existence of the defendant's assets within this court's jurisdiction was also not raised as one of the grounds to oppose the application as seen in the defendant's affidavit and the defendant's written submission.

[54] Therefore, based on the evidence before me, I find that the plaintiffs have shown that the defendant has assets within the jurisdiction of this court.

Whether the plaintiffs have shown that there is a real risk that the defendant's assets will be dissipated or moved before judgment could be satisfied

[55] I find that whether there is a real risk that the defendant may remove his assets before judgment could be satisfied is an issue that has to be determined based on the facts and evidence before court. The term 'real risk of dissipation of assets' is a term of art that must be determined by a court of law based on the facts and evidence before it. No single formulae could be utilised, and it is impossible to formulate any simple rule that could be used for every case.

[56] This appears in the judgment of the English Court in *Les Ambassadeurs Club Ltd v Yu* [2021] EWCA Civ 1310. In that case, Lady Justice Andrew held:

> The focus should be on whether, on the facts and circumstances of the particular case, the evidence adduced before the court objectively demonstrates a risk of unjustified dissipation which is sufficient in all the circumstances to make it just and convenient to grant a freezing injunction. Plainly a risk which is theoretical, fanciful or insignificant will not meet that threshold; but the judge should be addressing the question whether he or she is satisfied that the alleged risk is real, and that does not require any comparative exercise to be carried out, or the attaching of some other label to a risk which falls short of the threshold. Judges and practitioners have been addressing the test for many years without the need for such a gloss. I would not wish it to be suggested that henceforth, in every case in which a freezing order is sought, in order to avoid being criticized for making an error of law, the Judge must specifically turn his or her mind to the question whether the risk of dissipation is real 'rather than fanciful.

[57] I must also remind myself that the case at hand concerns with the alleged dishonesty, fraud and the alleged tort of knowing receipt/dishonest assistance against the defendant. I have also found earlier that the plaintiffs have shown a good arguable case for the alleged claims against the defendant for these alleged wrongs.

[58] In view of the above, I must again refer to the decision of Lord Justice Haddon-Cave in *Lakatamia Shipping Company Ltd v Morimoto* where His Lordship explained the approach that a court should take when dealing with an application for Mareva injunction:

> 51. In my view, in the light of the authorities which I consider in detail below, the correct approach in law should be formulated in the following two propositions:
>
> (1) Where the court accepts that there is a good arguable case *that a respondent engaged in wrongdoing against the applicant relevant to the issue of dissipation, that holding will point powerfully in favour of a risk of dissipation.*
>
> (2) In such circumstances, it may not be necessary to adduce any significant further evidence in support of a real risk of dissipation; but each case will depend upon its own particular facts and evidence.

[59] This inference must be done with care and should not be done automatically. This could be seen in the following excerpts from the judgment of the English Court of Appeal which carefully analysed the decisions of the Courts of England on this issue:

> 52. In *Thane Investments,* Peter Gibson LJ issued what has sometimes been referred to as a 'salutary warning' as to how each case must be 'scrutinised with care' in order to establish whether an inference of dissipation should be made. Peter Gibson LJ said (at [28]):
>
> 28. Mr Blackett-Ord submitted that it has now become the practice for parties to bring ex parte applications seeking a freezing order by pointing to some dishonesty, and that, he says, is sufficient to enable this court to make a freezing order. I have to say that, if that has become the practice, then the practice should be reconsidered. *It is appropriate in each case for the court to scrutinise with care whether what is alleged to have been the dishonesty of the person against whom the order is sought in itself really justifies the inference that that person has assets which he is likely to dissipate unless restricted.* (Emphasis added.)
>
> 53. In *Jarvis Field Press Ltd v Chelton* [2003] EWHC 2674 (Ch), Patten J commented upon the import of Peter Gibson LJ's observations as follows (at [10]):
>
> 10. ... *I have no difficulty in accepting the general principle, emphasised by Peter Gibson LJ, that a mere unfocused finding of dishonesty is not, in itself, sufficient to ground an application for a WFO.* It is necessary to have regard to the particular respondents to the application and to ask oneself whether, in the light of the dishonest conduct which is asserted against them, there is a real risk of dissipation. As Peter Gibson LJ made clear in the passage I have already quoted, the court has to scrutinise with care whether what is alleged to have been dishonesty justifies the inference. *That is not, therefore, a judgment to the effect that a finding of dishonesty (or, in this case, an allegation of dishonesty) is insufficient to found the necessary inference. It is merely a welcome reminder that in order to draw that inference it is necessary to have regard to the particular allegations of dishonesty and to consider them with some care.* (Emphasis added.)

54. In *Madoff*, Flaux J carefully analysed the authorities such as *Norwich Union*, and *Grupo Torras* (at [163]–[167]) and cited the above prescient passage from Patten J's judgment in *Field Press.* Flaux J said (at [167]):

> 167. I agree with that analysis of the approach which the court should adopt when considering whether to grant a freezing injunction, in a case where there are allegations of fraud or deliberate misconduct against a defendant.

55. In *VTB Capital*, Lloyd LJ summarised how the exhortation by Peter Gibson LJ in *Thane Investments* should be properly read and understood as follows (at [177]):

> 177. We agree with Peter Gibson LJ that the court should be careful in its treatment of evidence of dishonesty. However, *where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out*, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets. (Emphasis added.)

(It should be noted that, when referring to the heart of 'the claim' in the above passage, Lloyd LJ was, I believe, referring to the claim for an injunction in the instant case.)

56. Lloyd LJ then cited Flaux J's observations in paragraphs [163]–[167] of *Madoff* in full and said (at [178]):

> 178. We agree with those observations by Flaux J. On that basis it seems to us that it would have been right for the judge to take into account a finding of a good arguable case that Mr Malofeev had been engaged in a major fraud, and that he operated a complex web of companies in a number of jurisdictions, which enabled him to commit the fraud and would make it difficult for any judgment to be enforced. *We would regard such factors as capable of providing powerful support for the case of a risk of dissipation.* (Emphasis added.)

57. In *Holyoake v Candy,* the claimants obtained a 'notification injunction', ie an injunction restraining the defendants from dealing with assets without first notifying the claimants on the basis of proof of dissipation. Nugee J found a good arguable case that the claimants had engaged in an unlawful means conspiracy (the unlawful means comprising fraudulent misrepresentation, duress, actual undue influence, unlawful interference, extortion and blackmail) and held that there was a real risk of dissipation by the defendants in the light of the unlawful means conspiracy and other evidence relating to (i) unexplained transfers of property, (ii) lavish expenditure, (iii) complex and opaque offshore structures and (iv) 'appalling conduct' by the defendants (see paragraph [20]). The Court of Appeal (Gloster LJ who gave the leading judgment, Jackson LJ concurring) reversed Nugee J's decision. The Court held that the Judge did not apply the correct test when granting the notification injunction in that he held that a lesser degree of risk would suffice to obtain a notification injunction as opposed to a conventional freezing order on the basis that the former was less intrusive than the latter (at [43]). The Court held that the test was the same and the claimants had to show a real risk of dissipation. Gloster LJ went on to consider the evidence and the matters relied upon

by the Judge and concluded as follows:

> 61. I conclude that, although the claimants' 'good arguable case' in relation to the defendant's alleged conduct could *theoretically* be taken into account in evaluating whether there was a risk of dissipation, *the evidence relating to the substance of those allegations was not sufficiently strong to support the necessary real risk of dissipation.* In coming to this conclusion I have applied the approach of this court in *VTB Capital plc v Nutritek International Corp and in Thane Investments Ltd v Tomlinson (No 1)* [2003] EWCA Civ 1272 at [28] namely that the court should scrutinise whether what is alleged in relation to a good arguable case really justifies the inference of a risk of dissipation. (Emphasis added.)

[60] This approach was adopted in Hong Kong as seen in *Convoy Collateral Ltd v Cho Kwai Chee (also known as Cho Kwai Chee Roy) and others* [2020] HKCA 537. In that case, the Hong Kong Court of Appeal reversing the decision of the judge of First Instance held:

> 35. The approach on assessment of risk of dissipation in the context of an application for freezing order was considered in the recent judgment of Haddon-Cave LJ in *Lakatamia Shipping Co Ltd v Toshiko Morimoto* [2019] EWCA Civ 2203 at [34]. His Lordship adopted (with a slight modification) the principles set out by Popplewell J (as Popplewell LJ then was) earlier in *Fundo Soberano de Angola v dos Santos* [2018] EWHC 2199 (Comm):
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> (1) The claimant must show a real risk, judged objectively, that a future judgment would not be met because of an unjustified dissipation of assets. In this context dissipation means putting the assets out of reach of a judgment whether by concealment or transfer.
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> (2) The risk of dissipation must be established by solid evidence; mere inference or generalised assertion is not sufficient.
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> (3) The risk of dissipation must be established separately against each respondent.
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> (4) It is not enough to establish a sufficient risk of dissipation merely to establish a good arguable case that the defendant has been guilty of dishonesty; it is necessary to scrutinise the evidence to see whether the dishonesty in question points to the conclusion that assets may be dissipated. It is also necessary to take account of whether there appear at the interlocutory stage to be properly arguable answers to the allegations of dishonesty.
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> (5) The respondent's former use of offshore structures is relevant but does not itself equate to a risk of dissipation. Businesses and individuals often use offshore structures as part of the normal and legitimate way in which they deal with their assets. Such legitimate reasons may properly include tax planning, privacy and the use of limited liability structures.
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> (6) What must be threatened is unjustified dissipation. The purpose of a [World Freezing Order] is not to provide the claimant with

security; it is to restrain a defendant from evading justice by disposing of, or concealing, assets otherwise than in the normal course of business in a way which will have the effect of making it judgment proof. A WFO is not intended to stop a corporate defendant from dealing with its assets in the normal course of its business. Similarly, it is not intended to constrain an individual defendant from conducting his personal affairs in the way he has always conducted them, providing of course that such conduct is legitimate. If the defendant is not threatening to change the existing way of handling their assets, it will not be sufficient to show that such continued conduct would prejudice the claimant's ability to enforce a judgment. That would be contrary to the purpose of the WFO jurisdiction because it would require defendants to change their legitimate behaviour in order to provide preferential security for the claim which the claimant would not otherwise enjoy.

(7) Each case is fact specific and relevant factors must be looked at cumulatively.

Subject to the following elaborations, we respectfully agree that these principles are applicable in Hong Kong. The Hong Kong Court of Appeal also alluded the following:

40. Since the assessment is in respect of the risk of dissipation as opposed to the fact of actual dissipation, the exercise necessarily involves an evaluative and predictive judgment. Thus, the evidential burden can be satisfied by drawing proper inferences from a holistic consideration of all the circumstantial materials that are indicative of risk, including matters which point against such risk. Such holistic approach is alluded to by Kerr LJ in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft* [1983] 1 WLR 1412 at p.1422H and Mortimer V-P in *CAC Brake Co v Bene Manufacturing Co Ltd* CACV 94/1998, 30 April 1998 at [18].

41. A solid basis to support an inference of risk of dissipation is to be contrasted with unsupported or bare statements of fear which would carry little weight. As observed by Sir Peter Pain in *O'Regan v Iambic Productions* (1989) 139 NLJ 1378 at 1379, 'unsupported statements and expressions of fear, carry very little, if any, weight. The court needs to act on objective facts.'

42. There are cases where a good arguable case on the underlying substantive claims could also be regarded as supporting a case of real risk of dissipation. As highlighted in proposition (4) in Popplewell J's summary, the court needs to scrutinise with care whether the allegations in respect of the claims justify the inference of likelihood of dissipation.

43. Notwithstanding the broad statement of Godfrey J in *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLRD 235, Hong Kong judges have been vigilant in scrutinizing the allegations in a claim with care before drawing the inference of risk of dissipation. Chu J (as she then was) in *Hornor Resources v Savvy Resources* [2010] 4 HKC 50 cautioned that the court must examine with care allegations of dishonesty before inferring therefrom a real risk of dissipation.

...

A 53. To sum up, the approach set out by Haddon-Cave LJ in *Lakatamia Shipping Co Ltd v Toshiko Morimoto*, supra at [51] provides good guidance. *The ultimate question is whether CCL succeeds in showing objectively there is a solid basis for concluding that there is a real risk of unjustified dissipation of assets by a defendant. That question is to be answered by examining the evidence holistically. Evidence of dishonest and fraudulent* B *conducts or other serious wrongdoings which form the basis of the claims, and which reflect adversely on the integrity of the defendant could point powerfully towards an inference of such risk.*

[61] The above approach can also be seen locally. I refer to the decision of the C Malaysian Court of Appeal in *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83; [1995] 2 CLJ 893 and the recent decision of the Malaysian Court of Appeal in *The Customs and Tax Administration of the Kingdom of Denmark v Saling Capital & Ors* where Lee Heng Cheong JCA held:

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[42] *In determining whether there is a risk of assets being removed, lack of probity and honesty can be determining factors, in drawing a conclusion that there is such a risk of dissipation*. We are guided by the following cases:

(i) The Court of Appeal case of *Ang Chee Huat v Engelbach Thomas* E *Joseph* [1995] 2 MLJ 83; [1995] 2 CLJ 893;

(ii) The High Court case of *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1987] 1 LNS 57; [1988] 2 MLJ 261;

(iii) The Singapore Court of Appeal decision in *Amixco Asia Pte Ltd v Bank* F *Negara Indonesia 1946* [1992] 1 SLR 703; and

(iv) The High Court decision of *Patterson v BTR Engineering (Aust) Ltd & Ors* [1990] LRC Comm 683.

[43] In the light of our above findings, we find that the appellant has shown that in cases of complex financial fraud, particularly where financial dishonesty and a lack G of probity is established against the respondents, there is a serious risk that such respondents have, will and/or are likely to make themselves, shielded or protected against the claim for fraud and destroy evidence that will incriminate them in the fraud.

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[62] In this case, as I have alluded earlier, the plaintiffs have shown the money trail of the sums of RM42m and how they were transferred from the accounts of the plaintiffs through IPSB and eventually into the account of the defendant.

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[63] The manner and mechanism in which the said sums were transferred from SRC and GMSB at the instructions of Nik Ariff Kamil is clearly suspect and shows sufficient indication that it was undertaken without justification.

[64] At this juncture, the evidence indicates that the defendant was also aware or at the very least did not question why the said funds were transferred into his account. The evidence also shows that the defendant is aware of the transfer of the sums into his account. The defendant did issue the letter dated 24 December 2014 to AmIslamic Bank Bhd instructing that the sum of: (i) RM27m; and (ii) RM5m are to be transferred to Permai Binaraya Sdn Bhd and to Putra Perdana Construction Sdn Bhd respectively. In the aforesaid letter he also confirmed that Nik Ariff Kamil, the CEO of SRC was also his authorized personnel and was authorized to deal with his accounts. A further instruction was then issued by Nik Ariff Kamil to transfer the total sum of RM10m as seen in the letter dated 9 February 2015 to another private banking account.

[65] As I said earlier, I should not make any finding as to fault at this interlocutory stage and that this should only be done at trial. However, having considered the evidence before me, I find that the plaintiffs' allegation was met with deafening silence. The defendant is the best person to explain why he received the said sums and what happened to these monies. There was no explanation given in the said affidavit and I find that there is a lack of probity by the defendant at this juncture.

[66] I do note that the defendant contends that any such explanation may damage his defence against the charges that he now faces. However, I find that this justification is not acceptable in the circumstances of this case. At this stage, bearing in mind that the said criminal case has since been disposed of and now is pending a final appeal at the Federal Court, at the very least the defence and justification, if any, that was put forward before the High Court and Court of Appeal in those proceedings could have been put for consideration before me. This was not even suggested by the defendant in his affidavit in reply in opposition to the plaintiffs application for the aforesaid Mareva injunction.

[67] I am mindful again that I should not make any finding of liability at this stage. Neither should I take into account the outcome of the criminal proceedings against the defendant.

[68] However, for the purposes of determining whether there is any real likelihood that the assets will or may be dissipated to prevent the satisfaction of the judgment, I find that the documents presented in evidence, the serious allegations levelled against the defendant and the failure of the defendant to rebut these allegations and provide reasonable explanation indicate sufficient reasons to believe that there is a real risk of dissipation of assets.

[69] Furthermore, the evidence indicates to me at the very least a sufficient case for a claim of dishonestly to be answered by the defendant. I again refer to

A the decision of the Privy Council in *Royal Brunei Airlines v Tan* on the test to be used to determine whether a person or party had acted honestly in the circumstances of a case:

> Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *R v Ghosh* [1982] 1 QB 1053), *in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated.* Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety.
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> However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. *The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.*
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> In most situations there is little difficulty in identifying how an honest person would behave. *Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something, he would rather not know, and then proceed regardless.* However, in the situations now under consideration the position 15 not always so straightforward. This can best be illustrated by considering one particular area: the taking of risks.
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> ...
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> *The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances.* It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is 'guilty of commercially unacceptable conduct in the particular context involved': see *Cowan de Groot Properties Lid v Eagle Trust plc* [1992] 4 All ER 700, 761. Acting in reckless disregard of others' rights or possible rights can be a telltale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise, and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He

> might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.
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> Before leaving cases where there is real doubt, one further point should be noted. To enquire, in such cases, whether a person dishonestly assisted in what is later held to be a breach of trust is to ask a meaningful question, which is capable of being given a meaningful answer. This is not always so if the question is posed in terms of 'knowingly' assisted. Framing the question in the latter form all too often leads one into tortuous convolutions about the 'sort' of knowledge required, when the truth is that 'knowingly' is inapt as a criterion when applied to the gradually darkening spectrum where the differences are of degree and not kind.

[70] Therefore, having considered the evidence presented before me as a whole, I find that there is a real likelihood that the assets will or may be dissipated to prevent satisfaction of the judgment. I make the said finding after taking into consideration of 'the particular allegations of dishonesty' against the defendant, the lack of probity by the defendant and the evidence presented in the affidavits filed by parties.

[71] I have also taken into account the following issues that were raised by the defendant to support his contention that there is no real risk of dissipation:

(a) the civil claim by the Inland Revenue Board to the sum of RM1.69 billion and RM37.64m for taxes allegedly due to the defendant;

(b) the claim by 1MDB for breach of trust and other potential claims; and

(c) the criminal charges against him.

[72] To be clear, I repeat that I have not taken into account the findings of the courts with regard to the charges levelled against the defendant. I am not allowed to take those into consideration as provided for in s 43 of the Evidence Act 1950 and based on the decision of the Court of Appeal in *Datuk S Nallakaruppan & Ors v Datuk Seri Anwar bin Ibrahim and other appeals* [2015] 4 MLJ 34; [2015] 6 CLJ 425. I have ignored the findings made by the courts in those criminal proceedings for the purposes of this application.

[73] However, I find that the fact that the defendant had been sued for taxes unpaid and by 1MDB for breaches of his duties to the company would mean

to me that the risk of him dissipating the assets becomes enhanced. The risk does not dissipate merely because the defendant is facing multiple claims by third parties but in my opinion become enhanced and becomes substantially real based on the facts of this case as presented in the affidavits before me.

[74] Given the above, I find that the plaintiffs have shown to my satisfaction that there is a real risk of the assets being removed or dissipated before judgment is satisfied.

Other issues raised by the defendant

(a) the plaintiffs' application is late, grave and the delay is unexplained by the litigant;

(b) balance of convenience does not lie in favor of the plaintiffs;

(c) damages are adequate;

(d) there must be undertaking as to damages by the plaintiffs; and

(e) that the deponent of the affidavit on behalf of the plaintiffs does not have personal knowledge of the facts.

[75] I will now deal with the other issues raised by the defendant in the opposition to the plaintiffs' application.

[76] Firstly, I find that the complaints raised by the defendant that the plaintiffs had been indolent in pursuing their claims against him are not correct.

[77] The defendant contends that the plaintiffs were at liberty and had ample opportunity to pursue the claims since 2018 and should have done so without delay. His counsels argued that they took three years after the defendant lost office to file this claim against him in 2021 and again refer to the criminal charges brought against him by the attorney general. I have ignored the said criminal charges save for that they were pursued against the defendant as suggested in the defendant's own affidavit.

[78] In his affidavit in response the defendant also refers to the anti money laundering proceedings brought against him and argues that the failure by the plaintiffs to participate in those proceedings suggested that the plaintiffs had slept on their rights.

[79] However, I am of the opinion that the defendant's arguments do not hold water. The time frame in making the application was explained by the plaintiffs in paras 49–51 of the affidavit in support and at paras 7–8 of the

affidavit in reply affirmed on 3 March 2022. I find the explanation is given and the need to gather information and records as being credible and it would be folly for the plaintiffs to rush into litigation without undertaking an adequate audit of its affairs and the discovery of documents for the purposes of this suit.

[80] The fact that the plaintiffs chose not to be involved in the AMLA proceedings does not mean that they should be prevented from obtaining the orders sought herein. As indicated by the plaintiffs, they were of the view that they could not legally participate in those proceedings to show that they had a legal right to those assets in the said AMLA proceedings.

[81] Whereas the issue here is to preserve those assets to ensure that any judgment entered against the defendant will be paid or fulfilled. Different considerations apply and I am of the view that the argument put forward by the defendant's counsel does not justify the refusal of the orders sought by the plaintiffs.

[82] I am also of the opinion that this civil case should only be commenced after the commencement and determination of any criminal case against the defendant at first instance. I refer to the decision of the Court of Appeal *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail & Anor* [2017] 3 MLJ 478. This applies to both the criminal charges put forward against the defendant in relation to the same subject matter as well as the AMLA proceedings relating to any assets belonging to the defendant.

[83] I also refer to the decision of the English Court of Appeal in *Ras al Khaimah Investment Authority and others v Bestfort Development LLP and others* [2018] 1 WLR 1099 and the decision of our Court of Appeal in *The Customs and Tax Administration of Denmark v Saling Capital Ltd*. As long as the delay is not inordinate and does not create any prejudice to the defendant, then it should not be a bar from granting a Mareva injunction.

[84] Given the above, I find that the arguments on delay as relied on by the defendant do not prevent this court from granting the orders sought by the plaintiffs. The delay, if any, is not inordinate and does not create any real prejudice against the defendant.

[85] On the issue of damages and balance of convenience, I find that the defendant's contention does not justify refusal of the plaintiff's application. Having considered the seriousness of the complaints and the allegations levelled against the defendant and the evidence put forward in the affidavits that remain unrebutted, I find that balance of convenience does not lie with the defendant.

[86] The defendant having received the said substantial sums of monies through IPSB and through an account controlled by his own authorised personnel, the plaintiffs should not be allowed to put in place sufficient safeguards in the form of Mareva injunction to ensure that the defendant's assets are preserved in the interim. Especially, in view of the multiple suits pending in our courts against him and the real danger of the assets being dissipated as I found earlier. This again does not mean that the defendant's right to defend the claims is compromised.

[87] I am also of the opinion that the issue of adequacy of damages does not arise in a claim for Mareva injunction. After all, the intention of the said order is to ensure that the assets are sufficiently retained within the jurisdiction of this court to satisfy any judgment that may be subsequently entered against the defendant. Therefore, the subject matter of the injunction is to preserve the assets for the purposes of a final monetary judgment. This falls outside the scope of the usual arguments concerning the adequacy of damages put forward by the defendant's counsel. I therefore reject the said contention.

[88] To ensure that I am not accused of ignoring the arguments raised by the defendant, I also have taken into account the complaint by the defendant's counsel that the deponents of the affidavit on behalf of the plaintiffs were not present in the companies when the said transactions took place. He put substantial reliance on the fact that the deponent, Iszad Jeffri bin Ismail, an officer from the Ministry of Finance only came on board after the change of government and would not know of the facts of the case firsthand.

[89] I find that the said argument is incorrect. The statements made by Iszad Jeffri bin Ismail were made based on not only his personal knowledge but also based on the documents and records belonging to the plaintiffs. I also find that in a claim for fraud, wrongdoing and for the tort of misfeasance in public office, it is not surprising that these events would be pursued by new officers within the said entity and after undertaking an investigation into the affairs.

[90] It is expected that once there is a changing of guards, secrets could and usually come to light. To me nothing turns on this issue raised by the defendant's counsel, especially when the deponent of the said affidavit on behalf of the plaintiffs did state that his knowledge of the subject matter is not limited to his own personal knowledge but is also based on the documents in the control of the plaintiffs.

[91] Finally, on the issue of undertaking as to damages, I am satisfied that the plaintiffs have given the usual undertaking as contained in their affidavit in support.

DECISION OF THIS COURT

[92] For the aforesaid reasons, I grant the orders sought by the plaintiffs against the defendant as contained in Annexure A annexed to these grounds.

ANNEXURE A

Upon plaintiffs' undertaking to abide by any order that this honourable court may make as to damages in case the defendant has sustained any damage by reason of this order sought herein which the plaintiffs ought to pay.

It is hereby ordered on this day as follows:

(1) that the defendant, whether by himself and/or acting through his agents and/or officers and/or servants and/or employees and/or assignees or otherwise, must not remove from Malaysia or in any way dispose of deal with or diminish the value of any of his assets which are in Malaysia up to the value of RM42m pending the final determination or outcome of the action commenced by the plaintiffs;

(2) that the defendant, whether by himself and/or acting through his agents and or officers and/or servants and/or employees and/or assignees or otherwise, must not in any way remove, dispose of, deal with or diminish the value of any of his assets outside Malaysia up to the value of RM42m pending the final determination or outcome of the action commenced by the plaintiffs;

(3) that the defendant must disclose to the plaintiffs in writing of all his respective assets whether in or outside Malaysia up to the value of RM42m, whether in each of his own names or not and whether solely or jointly owned (with each other or otherwise) giving the value, location and details of all such assets, the information must be confirmed in an affidavit which must be served to the plaintiffs solicitors within 30 days after this order has been served on the defendant;

(4) if the total value free of charges or other securities ('unencumbered value') of the defendant's assets in Malaysia exceeds RM42m. The defendant may remove any of these assets from Malaysia or may dispose of or deal with them so long as the total unencumbered value of the defendant's asset still in Malaysia remains not less than RM42m;

(5) if the total unencumbered value of the defendant's assets in Malaysia does not exceed RM42m, the defendant must not remove any of those assets from Malaysia and must not dispose of or deal with any of them, but if the defendant has other assets outside Malaysia, the defendant may

dispose of or deal with those assets so long as total unencumbered value of all its assets whether in or outside Malaysia, remains not less than RM42m;

(6) the assets referred to in paras (1)–(5) would include any property whether movable or immovable and any money standing for the credit of any bank account, including the amount of any cheque drawn on such account which has not been cleared and includes any asset which he has power directly or indirectly to dispose of or deal with as if it was his own. The defendant is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions;

(7) that the defendant shall be entitled to draw and expend from a bank account or other source, the identity of which shall first be notified by the defendant to the plaintiffs' solicitors:

(a) a sum not exceeding RM100,000 per month required by the defendant for his ordinary living expenses and legal expenses;

(b) should the defendant require more than RM100,000 per month, he should seek written consent from the plaintiffs solicitors; and

(c) in the event no written consent is given, the defendant should seek leave from the court for a sum more than RM100,000 per month.

(8) the order should have no effect on anyone outside the jurisdiction save Beam for the defendant, whether by himself and/or acting through his agents and/or officers and /or servants and/or employees and/or assignees or some otherwise who are subject to the jurisdiction by the court and have notice of the order and are able to prevent conduct which constitutes or assists in a breach of the order and on any other person only to the extent that the order is declared to be enforceable by a court in that jurisdiction;

(9) in respect of assets located outside the jurisdiction, the order shall not prevent any third party from complying with any duty under the laws of that foreign jurisdiction, or under the proper law of the contract or any order of the courts of that foreign jurisdiction provided reasonable notice of such an order is given to the plaintiffs solicitors;

(10) that any person whether a party to these proceedings or otherwise, notified of this order, should not knowingly assist or permit a breach of this order. It is a contempt of court should any person do so;

(11) that the defendant and/or anyone notified of this order may apply to court at any time to vary or discharge this order (or so much of it as affects that person), but anyone wishing to do so must inform the plaintiffs solicitors;

(12) that parties be at liberty to apply; and

(13) that cost of and incidental to this application be cost in the cause.

Orders sought by plaintiffs against defendant as contained in Annexure A of grounds of judgment granted.

Reported by Dzulqarnain Ab Fatar